

EX PARTE OR LATE FILED

## WILLKIE FARR &amp; GALLAGHER

Three Lafayette Centre  
1155 21st Street, NW  
Washington, DC 20036-3384  
202 328 8000

RECEIVED

Direct: 202 429 4732  
Fax: 202 887 8979  
tjones@willkie.com

Thomas Jones

SEP 12 2002

September 12, 2002

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**EX PARTE**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
Room TW-A325  
445 12th Street, S.W.  
Washington, DC 20554

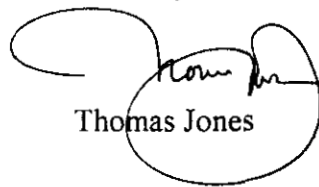
Re: CC Docket Nos. 01-321, 00-51, 98-147, 96-98, 98-141, 96-149, 00-229, 01-338, RM  
10329

---

Dear Ms. Dortch:

On September 12, 2002, a copy of the attached letter from Kevin Joseph to Michelle Carey, Chief of the Competitive Policy Division, Wireline Competition Bureau, was hand-delivered. Pursuant to Section 1.1206(b)(1) of the Commission's rules, 47 C.F.R. § 1.1206(b)(1), two copies of this letter and the attached letter are being filed for inclusion in the public record of each of the above-referenced proceedings.

Sincerely,



Thomas Jones

Attachment

cc: Bill Maher  
Jeff Carlisle  
Michelle Carey  
Scott Bergmann  
Robb Tanner  
John Stanley  
Uzoma Onyeije  
Renee Crittendon  
Christine Newcomb

Washington, DC  
New York  
Paris  
London



*allegiancetelecom, inc.*

1919 M Street, NW  
Suite 420  
Washington, D.C. 20036  
202/464-1789 phone  
202/464-0760 fax

September 12, 2002

**VIA HAND DELIVERY**

Michelle Carey  
Chief, Competitive Policy Division  
Wireline Competition Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Re: CC Docket Nos. 01-321, 00-51, 98-147, 96-98,  
98-141, 96-149, 00-229, 01-338, RM 10329

Dear Ms. Carey:

This letter is written to respond to the policies jointly proposed by BellSouth and Time Warner Telecom ("TWTC") for unbundling and special access performance measurements ("BellSouth-TWTC Proposal").<sup>1</sup> Allegiance Telecom disagrees with several aspects of the BellSouth-TWTC Proposal. This letter focuses, however, on the standard BellSouth and TWTC propose for determining whether incumbent LECs should be required to provide unbundled interoffice transport.

BellSouth and TWTC propose, among other things, that ILEC unbundling obligations for interoffice transport be eliminated on any point-to-point route on which "either the A or Z end office has 3 or more facilities based competitors." BellSouth-TWTC Proposal at 3. There is no basis in law or policy for this standard. In *USTA v. FCC*,<sup>2</sup> the D.C. Circuit ruled that the Commission had failed in the *UNE Remand Order*<sup>3</sup> to examine the "state of competitive

---

<sup>1</sup> The BellSouth-TWTC Proposal was submitted as an attachment to a letter from William W. Jordan, V.P. Federal Regulatory, BellSouth to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-321 and 01-338 (Aug. 26, 2002).

<sup>2</sup> 290 F.3d 415 (D.C. Cir. 2002).

<sup>3</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*").

impairment in any particular market.”<sup>4</sup> As Allegiance explained in its reply comments in the Triennial Review proceeding, in order to satisfy the requirement that the specific markets for unbundled elements be examined, any proposed impairment standard must be based on a properly defined relevant geographic market for the provision of a UNE.<sup>5</sup> In addition, a requesting carrier should be deemed to be impaired in the absence of a UNE in a particular geographic market if the incumbent LEC has market power over the provision of the UNE in question. *See id.* at 18-19.

In the case of interoffice transport, as in the case of any other transmission service (including the provision of unbundled loops), the relevant geographic market is unquestionably the particular point-to-point route for which the requesting carrier seeks transmission. As the Commission explained in the indistinguishable context of long distance service, the relevant geographic market consists of “all possible routes that allow for a connection from one particular location to another particular location (*i.e.*, a point-to-point market).”<sup>6</sup> Indeed, the BellSouth-TWTC proposal implicitly concedes this point by focusing on whether there is adequate competition on any “A” to “Z” route, *i.e.*, on any point-to-point route.

Unfortunately, BellSouth and TWTC propose a means of assessing the extent of an incumbent’s market power on a particular route that is utterly arbitrary.<sup>7</sup> The fact that three competitive carriers are able to justify constructing facilities to carry traffic over a very high volume point-to-point route that terminates at a particular end office in no way indicates that other routes connecting the same end office can also support such construction. For example, there may be enough traffic between end office A and IXC points of presence to support three different special access facilities-based competitors in end office A. But this fact in no way indicates whether there is enough traffic volume and whether the relevant entry barriers are low enough to justify *any* construction of non-ILEC sources of supply between end office A and end office Z. Thus, there is simply no rational relationship between the BellSouth-TWTC test and the level of impairment over a particular point-to-point route.

The relevant Commission precedents support this common sense conclusion. For example, in the *UNE Remand Order*, the Commission recognized that “the record indicates that competitive LECs have deployed interoffice transport facilities along selected point-to-point routes.” *UNE Remand Order* ¶ 333. But the Commission went on to conclude that this did not mean that non-ILEC sources of transport would be available on other routes in the same

---

<sup>4</sup> *USTA v. FCC*, 290 F.3d at 422.

<sup>5</sup> *See* Allegiance Reply Comments, CC Docket Nos. 01-338, 96-98, 98-147, at 25-27 (filed July 22, 2002) (corrected version).

<sup>6</sup> *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC’s Local Exchange Area; Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Red 15756, ¶ 64 (1997).

<sup>7</sup> *See* Letter from Jason Oxman, Vice President and Assistant General Counsel, Covad Communications, to Michelle Carey, FCC, CC Docket Nos. 01-321 and 1-338, at 1-2 (Aug. 27, 2002).

geographic area. *Id.* Similarly, in the international market, the Commission has concluded that the level of competition on routes connecting the U.S. and another country offers no indication of the level of competition on routes connecting the U.S. and a different country.<sup>8</sup> The fact that both sets of routes may connect at the same point in the U.S. is utterly irrelevant to the analysis.

This point is also supported by the reasoning in the Supreme Court's opinion in the seminal antitrust case *United States v. Terminal Railroad Association*.<sup>9</sup> In that case, the Court found that fully 24 railroads converged upon St. Louis, roughly half terminating on one side of the St. Louis River and half terminating on the other side of the river. *Id.* at 395. The problem was that an association consisting of 14 of the 24 railroads controlled the facilities necessary to transport trains *across* the river. *Id.* at 407. Because of the association's incentive and opportunity to exploit its market power over the point-to-point route in question, the Supreme Court ruled that the association constituted an unlawful combination in restraint of trade and imposed a detailed set of duties to deal on the association. *Id.* at 411-13. Obviously, the fact that competition had developed such that about a dozen competitors terminated traffic to points on either end of a particular route in no way demonstrated that competition must exist *between* the points in question.

In sum, the absence of any nexus between the standard proposed by BellSouth and TWTC and the level of actual ILEC market power on a particular point-to-point route renders the standard completely inappropriate. The standard is also so "abstracted away" from and "detached from" the relevant market power analysis that it flies in the face of the court's reasoning in *USTA v. FCC*. See *USTA v. FCC*, 290 F.3d at 423, 426.

Indeed, as Allegiance explained in its comments, the only appropriate way to assess the extent of an incumbent LEC's market power on a particular point-to-point interoffice transport route is to examine the number of non-ILEC substitutes that have actually been deployed over that route.<sup>10</sup> The entry barriers associated with the deployment of transport facilities (not the least of which is the inability of competitive carriers to obtain financing to pay for such construction) are simply too high to rely on the presence of potential competitors to diminish the incumbents' market power. Moreover, it is futile to try to define general categories of interoffice transport circuits (*e.g.*, by the capacity of those circuits) for purposes of the impairment analysis. As the record in the Triennial Review demonstrates, the entry barriers associated with the construction of interoffice transport are subject to a level of variability that precludes such an

---


<sup>8</sup> See *International Competitive Carrier Policies*, Report and Order, 102 FCC 2d 812 (1985); *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended*, Notice of Proposed Rulemaking, 11 FCC Rcd 7141, ¶ 49 n.116 (1996).

<sup>9</sup> 224 U.S. 383 (1912).

<sup>10</sup> See Allegiance Comments, CC Docket Nos. 01-338, 96-98, 98-147, at 6-9 (filed Apr. 5, 2002). Only where four alternatives have been deployed should a requesting carrier be deemed unimpaired. See *id.* at 9-10.

approach.<sup>11</sup> Thus, the only appropriate approach is to assess impairment based on the actual number of non-ILEC alternatives that have been deployed on a particular route.

Sincerely,



Kevin M. Joseph  
Senior Vice President  
Government & External Affairs  
Allegiance Telecom, Inc.

cc: Scott Bergmann  
Robb Tanner  
John Stanley  
Uzoma Onyeije  
Renee Crittendon  
Christine Newcomb

---

<sup>11</sup> The reasons for this are numerous and have already been discussed in comments and reply comments in the Triennial Review. The most obvious example of a variation among different routes is that a carrier may be able to achieve economies of scale or scope on one route but not another. In addition, the need to obtain municipal rights-of-way imposes highly variable costs (depending on the locality) on firms seeking to construct transport facilities. See Allegiance Reply Comments, CC Docket Nos. 01-338, 96-98, 98-147, at 46-47 (filed July 22, 2002) (corrected version); AT&T Comments, CC Docket Nos. 01-338, 96-98, 98-147, at 142-44 (filed Apr. 5, 2002) (public version).